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Supreme Court, U.S.
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No. 93-1931

In The

Supreme Court of the United States

October Term, 1993

ROY LEE FOWLER,

Petitioner,

vs.

WAYNE VANMETER, DAVID H. KERR, and the CITY OF WEST POINT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS AND JUDGMENT BELOW

Within the Appendix to the Petition for Writ of Certiorari Petitioner [hereinafter referred to as "Fowler"] has provided the Order of the Honorable G. Ernest Tidwell, Judge, United States District Court for the Northern District of Georgia [hereinafter referred to as the "district court"], entered on April 21, 1993. Fowler also includes in his Appendix the January 20, 1994 decision of the United States Court of Appeals for the Eleventh Circuit [hereinafter referred to as the "Eleventh Circuit"] in *Fowler v. VanMeter, et al.*, No. 93-8547, (per curium) (11th Cir. 1994), and that court's denial of Fowler's Petition for Rehearing, dated February 23, 1994.

STATEMENT OF JURISDICTION

Respondents agree with Fowler's Statement of Jurisdiction. Respondents additionally show that jurisdiction is conferred by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondents show that this action involves claims that were brought under the Fourteenth Amendment to the Constitution of the United States pursuant to 42 U.S.C. § 1983.

STATEMENT OF THE CASE

With but one exception, Respondents agree with the "Proceedings and Dispositions Below" portion of Fowler's Statement of the Case. Respondents do take issue with Fowler's statement that, in part, the basis of his complaint in the district court was his "arrest." To the contrary, the only ground for recovery advanced by Fowler in the district court and before the Eleventh Circuit was that Respondents were responsible for the destruction of evidence alleged to be exculpatory in nature, subsequent to his arrest, thus resulting in his being convicted for driving while under the influence of alcohol [hereinafter referred to as "DUI"]. (R-1, ¶¶ 19, 20.) At no time has Fowler ever raised any issue concerning the propriety of his "arrest," nor does it appear, despite the improvident reference thereto in his Petition, that he is raising this issue now.

Respondents also have very little disagreement over the content of the "Statement of the Facts" portion of Fowler's Statement of the Case. However, two (2) matters warrant explanation and comment.

On August 29, 1989, Fowler was pulled over for routine traffic violations by Respondent Wayne VanMeter [hereinafter referred to as "VanMeter"] of the West Point Police Department. Because VanMeter smelled alcohol upon Fowler's breath, VanMeter then subjected Fowler to two (2) field sobriety tests. Fowler failed both. (R-11, Deposition of Wayne VanMeter [hereinafter "VanMeter depo."], pp. 12-16; R-10, Certified Copy of Criminal Trial Transcript of *State v. Fowler* [hereinafter "Criminal Trial Transcript"], pp. 8-9.) In Fowler's Petition, Fowler now

disputes that he failed these tests. (Petition, p. 17.) Yet, Fowler's own deposition testimony is clear and to the contrary. (R-11, VanMeter depo., pp. 16, 77, 112, 114-18.)

The second matter requiring clarification is Fowler's depiction of what occurred at his DUI trial. Fowler explains he first learned of the possible existence of the allegedly exculpatory tape during his cross-examination of VanMeter at the trial. This is followed by the statement that "over objection of counsel for Mr. Fowler, evidence of the breath analysis was submitted to the jury as evidence." By this statement, Fowler seems to imply that his lawyer objected to the admission of the breath analysis because of the possible existence of the tape. He did not. Rather, the objection was based solely on the issue of whether the officer operating the intoximeter was state certified on the machine in question. (R-10, Criminal Trial Transcript, pp. 22-49.) The objection had nothing to do with the alleged failure of VanMeter to read Fowler his implied consent warning, or any other issue surrounding the existence of the audio tape of the traffic stop which led to Fowler's arrest and conviction.

SUMMARY OF THE ARGUMENT

Fowler's Petition for Writ of Certiorari should be denied. First and foremost, not one of the five (5) questions Fowler presents for review was raised in either the district court or in the Eleventh Circuit. This Court has long held that it is only in the most exceptional case that issues not presented below will be reviewed by this Court. This is not such an exceptional case.

Second, questions 2 through 5 set forth more the musings and frustrations of a losing party than they do the kind of meaty issues appropriate for appellate review. The record clearly shows the district court correctly applied the law concerning summary judgment and properly granted Respondents' motion.

Third, with respect to the first question Fowler presents for review, the fact is that district courts *are* authorized to enter summary judgment on issues not raised by the moving party if the record otherwise shows there is no genuine issue of material fact for trial. *Broderick Wood Products Company v. United States*, 195 F.2d 433 (10th Cir. 1952); *Board of National Missions of Presbyterian Church in the United States v. Smith*, 182 F.2d 362 (7th Cir. 1950); *Wisnouse v. Telsey*, 367 F. Supp. 855 (S.D.N.Y. 1973). At the same time, Respondents show that in fact, the district court did not grant Respondents' motion on the basis of an issue which was not raised. Contrary to Petitioner's contention, the court granted summary judgment because it concluded that "the outcome of Fowler's trial would not have been altered if he had been provided the tape recording, and not because the audio tape was not "newly discovered evidence." Thus, there was no substantive due process violation, which is what Respondents argued to begin with.

In the final analysis, all Fowler really complains about is that the district court granted Respondents' Motion for Summary Judgment. However, nowhere in his Petition does Fowler set forth one compelling reason why this Court should grant a writ of certiorari in such a case. He sets forth none because there is none. This Court's

time and resources would be better spent reviewing those cases of a character set forth in Rule 10 of this Court.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO ISSUE A WRIT OF CERTIORARI BECAUSE NO QUESTION PRESENTED FOR REVIEW HERE WAS FIRST RAISED IN THE LOWER COURTS

None of the questions Fowler presents for review was raised in the district court or in the Eleventh Circuit. Only in "exceptional" cases will this Court review questions not presented or passed upon below.

> This court sits as a court of review. It is only in exceptional cases coming here from federal courts that questions not presented or passed upon below are reviewed.

Duigan v. United States, 274 U.S. 195, 200 (1927); *see also City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19 (1986); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Heckler v. Campbell*, 461 U.S. 458 (1958).

Of course, this is consistent with the policy behind Rule 10 of this Court. Cases must be of sufficient import for this Court to dedicate its scarce resources to passing upon them. And, it is unlikely that cases will be of such character where their issues have never been raised below.

Moreover, almost uniformly, the cases which this Court has considered "exceptional," justifying initial review in this Court, have concerned the rights of criminal defendants. *See, e.g., Clyatt v. United States,* 197 U.S. 207 (1905); *Wiborg v. United States,* 163 U.S. 632 (1896). Indeed, Respondents have been unable to find a single civil case which this Court found to be "exceptional."[1]

Notably, Fowler omits any argument that this case is "exceptional," warranting review of those issues not first presented below. The omission is understandable, however, as no exceptional circumstances exist. Consequently, Fowler's Petition should be denied.

II. SUMMARY JUDGMENT IS APPROPRIATE ON AN ISSUE NOT RAISED BY A MOVANT, IF THE MOVANT HAS OTHERWISE MET ITS BURDEN OF SHOWING THE COURT THERE IS NO GENUINE ISSUE OF MATERIAL FACT FOR TRIAL

In reaching the conclusion that Respondents did not violate Petitioners Substantive Due Process rights, the district court held:

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[1] It has been suggested that this Court may exercise its review powers of questions not raised below *only* in criminal cases.

> We lack here the power occasionally exercised . . . to correct in criminal cases vital errors although the objection was not taken in the trial court. (cits. omitted).

Terminiello v. City of Chicago, 377 U.S. 1, 10 n. 1 (1949) (Frankfurter, J., dissenting).

> The totality of the evidence produced at Fowler's [State DUI] trial leads the court to the conclusion that there is not a reasonable probability that the result of Fowler's trial would have been altered if he had obtained the tape indicating that VanMeter did not give Fowler the implied consent warning.

(R-17, Order granting Motion for Summary Judgment, p. 12.) This was the precise issue raised by Respondents when they filed their motion for summary judgment. Almost as an afterthought, the district court also mentioned that because the existence of the tape was discovered during Fowler's criminal trial, the tape did not constitute "newly discovered evidence" under Georgia law. This secondary analysis, appropriately characterized as dictum, had no bearing on the court's decision.

At the same time, even if the district court had relied upon the "newly discovered evidence" theory as a basis for granting summary judgment, it would have been authorized to do so. Historically, federal courts have authorized summary judgment on grounds not advanced by a movant if the movant has otherwise successfully met its burden of showing there is no genuine issue of material fact for trial. *Broderick Wood Products Company v. United States,* 195 F.2d 433 (10th Cir. 1952); *Board of National Missions of Presbyterian Church in the United States v. Smith,* 182 F.2d 362 (7th Cir. 1950); *Wisnouse v. Telsey,* 367 F. Supp. 855 (S.D.N.Y. 1973). In *Board of National Missions* the Seventh Circuit noted:

> The plaintiff, therefore, contends that the District Court committed error in granting defendant's motion for summary judgment on the question of the construction of Rankin's Will.

requirement of the *Adickes* case made it very difficult for summary judgment to be had in cases.

These same commentators have suggested that the infrequent use of summary judgment procedures following *Adickes* was the Supreme Court's motivation for reinvigorating the procedure in 1986 is a trio of cases. The case most frequently cited by Courts and the commentators regarding summary judgment standards today is *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This is the case most heavily relied upon by the district court in the present matter. The other members of the trio of cases were *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In the *Celotex* decision, the Court held that if the party moving for summary judgment did not bear the burden of proof at trial, then the moving party did not need to negate every essential element of the nonmoving party's case. Rather, the Court held, if the above situation is present, then the *moving party need discharge its burden only by demonstrating* the absence of an essential element of the case of the party bearing the burden at trial. Hence the moving party's burden is "discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. The Court, therefore, gave party's not bearing the burden of proof at trial an easier avenue for supporting their motion for summary judgment.

These three cases have received a great deal of discussion throughout the federal judiciary and by the commentators. Nelken (1988) in reciting the relevant summary judgment standard enunciated by *Celotex* has mentioned two ways a moving party could meet its initial burden if it did not have the burden at trial. She applies both the *Celotex* and *Anderson* cases in her summary. She concludes:

> **A moving party may meet its initial burden in either of two ways: (1) by *producing* affirmative evidence to negate an essential element of the nonmoving party's case, or (2) by *"showing"* the court, after appropriate time for discovery, that the record is devoid of legally sufficient evidence to establish an essential element of the nonmoving party's case. (Nelken, p. 82)** (emphasis added)

This is the situation in the case at bar, a moving party not bearing the burden of proof at trial.

It was in an effort to clarify the disagreements over the initial burden of the moving party on a motion for summary judgment that the Eleventh Circuit decided the case *Clark v. Coats & Clark, Inc.*, 929 F.2d. 604 (11th Cir. 1991). In the *Clark* case, the Eleventh Circuit held that the *Adickes* case is still the generally applicable rule governing motions for summary judgment. The Eleventh Circuit held that the *Celotex* cases, and the other two in the trio, merely clarified the decision in *Adickes*. In this regard, the court held that "*Celotex* involved an unusual situation." *Clark*, 929 F.2d at 607 (11th Cir. 1991) The court in *Clark* restated that the *moving party always bears the initial burden to show* that there are no genuine issues of material facts which need resolution at a trial. And, *only after such a showing*, does the burden shift to the nonmoving party to show the existence of a genuine issue of material fact precluding summary judgment. Going further, the eleventh circuit in *Clark* held:

> **under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances *it is sufficient to point* to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after Celotex it is never enough simply to state that the non-moving party cannot meet its burden at trial. *Clark*, 929 F.2d at 608 (11th Cir. 1991)** (emphasis added)

The district court does define the standard which it applies when it writes:

> **Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof *and* (2) the summary movant has made a *plausible showing* of the absence of evidence on the necessary element.** (emphasis added)

In support of this statement, the district court cites *Celotex*. It can therefore be said that, assuming the validity of the district court's interpretation, if the nonmoving party has the burden of proof at trial as to an essential element of his case, if the moving party makes a plausible showing that there is an *absence* of evidence to support the essential element, and if the nonmoving party fails to

come forward with specific evidence which support the essential element, then summary judgment is appropriate.

What is the common theme running through the entire discussion of the correct standard for summary judgment?: there must be an initial showing by the moving party. In this case, the party moving for summary judgment never contended that the tape was not "newly discovered evidence." Nevertheless, the District Court went beyond the showing of the Appellees and made its own determination, in an abuse of discretion.

The Lack of a Showing

In their Motion for Summary Judgement, the Appellees argued that (a) Mr. Fowler's claims were barred by collateral estoppel, (b) Mr. Fowler's rights were not violated because he would have been convicted even with the tape, (c) part of Mr. Fowler's claims were barred by the statute of limitations, (d) Defendants Vanmeter and Kerr were entitled to qualified immunity, and (e) Mr. Fowler had failed to make a showing of governmental liability. Nowhere in their motion or in their attached brief or supporting materials did the moving party raise the issue of newly discovered evidence as is required in order for a showing to be made. Even at oral argument, the attorney for the appellees *did not raise* the issue of newly discovered evidence, but rather disputed the Court's tentative opinion that the tape was not newly discovered under Georgia law. If the Appellees, with their highly competent legal team, have failed to raise the issue which seems to be dispositive, then it is a clear violation of the summary judgment rules for the District Court, on its own initiative to enter summary judgment, and this Court surely cannot affirm such an entry.

The Pleadings in the Record

The Court of Appeals, at oral argument, was correct in its reading of the Complaint filed by Mr. Fowler. Paragraph 8 of the complaint did in fact indicate that Mr. Fowler discovered the tape during his trial. However, Rule 15 of the *Federal Rules of Civil Procedure* allows for the amendment of the pleadings to conform to the evidence. Specifically that rules holds: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been

raised in the pleadings." Under this provision, the Plaintiff would be allowed to amend his complaint, to deny the discovery of the tape during the trial, and to demand a jury determination of whether the tape was discovered since trial. This amendment would clearly be with the consent of the Appellees for they are in substantial agreement with Mr. Fowler on this issue. Moreover, the Defendant did not raise this issued before the District Court in their Motion for Summary Judgment.

> *Have the lower courts misapplied Rule 56 of the Federal Rules of Civil Procedure in allowing the entry of summary judgment in cases in which such entry is not justified?*

THE SUMMARY JUDGMENT STANDARD AS INTERPRETED BY THE LOWER COURTS SMITES THE FACE OF JUSTICE

The case most frequently cited by Courts and the commentators regarding summary judgment standards today is *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This is the case most heavily relied upon by the district court in the present matter. The other members of the trio of cases were *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In the *Celotex* decision, the Court held that if the party moving for summary judgment did not bear the burden of proof at trial, then the moving party did not need to negate every essential element of the nonmoving party's case. Rather, the Court held, if the above situation is present, then the moving party need discharge its burden only by demonstrating the absence of an essential element of the case of the party bearing the burden at trial. Hence the moving party's burden is "discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. The Court, therefore, gave party's not bearing the burden of proof at trial an easier avenue for supporting their motion for summary judgment.

In the *Anderson* case, the Court held that only those disputes over facts which might legitimately affect the outcome are material within the definition in the Rule. Thus, the court defined the material facts requirement of the Rule. The Court further, in

Anderson, enunciated a test for determining whether a genuine issue of a material fact existed. The Court applied the same test as traditionally applied to motions for directed verdict: whether the evidence is sufficient to sustain a verdict for the nonmoving party. Finally, in applying the test, the Supreme Court required that the district court review the evidence in the light most favorable to the nonmoving party and assess its sufficiency according to the evidentiary burden of the controlling substantive law.

Finally, in the *Matsushita* case, the Court did uphold the entry of summary judgment in an antitrust case involving an alleged conspiracy to fix unreasonably low prices. This case is primarily interesting for it allows the entry of summary judgment in cases alleging conspiracies were motivations, intentions, and states of mind are relevant issues. Prior to the *Matsushita* case, it was a general rule that only a jury was in the position needed to resolve issues of intent, motive, and state of mind. However, the Court held in *Matsushita* that a case need not go to a jury if plaintiffs produce not direct evidence of a conspiracy, and that merely an inference of conspiratorial and unlawful conduct for circumstantial evidence was insufficient.

These three cases have received a great deal of discussion throughout the federal judiciary and by the commentators. Nelken (1988) in reciting the relevant summary judgment standard enunciated by *Celotex* has mentioned two ways a moving party could meet its initial burden if it did not have the burden at trial. She applies both the *Celotex* and *Anderson* cases in her summary. She concludes:

> **A moving party may meet its initial burden in either of two ways: (1) by producing affirmative evidence to negate an essential element of the nonmoving party's case, or (2) by "showing" the court, after appropriate time for discovery, that the record is devoid of legally sufficient evidence to establish an essential element of the nonmoving party's case. (Nelken, p. 82)**

This is the situation in the case at bar, a moving party not bearing the burden of proof at trial. Nelken also questioned the Court's use of a directed verdict standard in the there are "practical differences created by the fact that summary judgment, unlike directed verdict, is sought before the nonmoving party has attempted a full presentation of its case." (Nelken, p. 65)

The shift in the Supreme Court's position on summary judgment in 1986 was not unnoticed by the federal judiciary. In fact, Issacharoff and Lowenstein (1990), in an empirical study, demonstrated the dramatic upsurge in the use of summary judgment motions following the trio of cases above. Of course, with so many different courts and commentators considering the issue of summary judgment, numerous interpretations of the Supreme Court's opinions were made. It was in an effort to clarify the disagreements over the initial burden of the moving party on a motion for summary judgment that the Eleventh Circuit decided the case *Clark v. Coats & Clark, Inc.*, 929 F.2d. 604 (11th Cir. 1991).

> *To what extent, if any, may district courts enter summary judgment as a means of clearing their civil docket although such an entry might be technically precluded?*

Chin (1992) has reviewed the *Clark* decision and supports the position taken by the Eleventh Circuit in that case. His arguments are generally opposed to the expansion of the use of summary judgment, especially if the sole purpose is to clear the court's calendars and deny access to the court system to litigants merely to dismiss legitimate claims easily. In arguing in favor of the *Clark* decision, Chin cites the subjective issues of intent. He notes:

> **Prior to *Celotex*, courts generally would not grant summary judgment when the disputed issues turned on subjective factors such as intent, knowledge, or motivation. This changed after *Celotex*, when courts not only revised the level of the movant's initial burden, but also displayed a willingness to resolve issues of intent or motive on summary judgment. In *Clark*, however, the Eleventh Circuit correctly reaffirmed the need for caution before deciding issues of intent of summary judgment. (Chin at 1021)**

The Eleventh Circuit has therefore taken the position that summary judgment must be employed with great caution.

Along similar lines, the Eleventh Circuit decided *U.S. v. Four Parcels of Real Property*, 941 F.2d. 1428 (11th Cir. 1991). This cases, brought by the United States, was a civil forfeiture suit against property purchased by a convicted drug dealer. After the

district court granted summary judgment for the claimant, the government appealed. The Eleventh Circuit, sitting *en banc*, vacated the entry of summary judgment by the district court holding that the determination of whether or not the property was purchased with drug money was a genuine issue of material fact precluding summary judgment.

As a summary of the requirements for the entry of summary judgment, it can be said summary judgment in inappropriate if there is a genuine issue of material fact. Summary judgment is therefore precluded if, when taking all of the evidence on file in a light most favorable to the nonmoving party, there exists sufficient evidence from which a jury could return a verdict for the nonmoving party. In *Hutcherson v. Progressive Corporation*, 984 F.2d 1152 (11th Cir. 1993), the Eleventh Circuit has held that all reasonable inferences must be drawn in favor of the nonmoving party and that the court may not weight the evidence to resolve factual disputes on a motion for summary judgment. Rather, this court has held that if a genuine issue of material fact is found, summary judgment must be denied.

> *Are plaintiffs in civil actions being unduly burdened by Rule 56 motions for summary judgment in that they have to satisfy a standard of proof higher than that which is essential for them to prevail at trial?*

Issacharoff and Lowenstein (1990) have argued strongly against the use of summary judgment in general. They have, through empirical studies, found that to begin with, easing the standards of summary judgment motions has adverse consequences for the ability of parties to settle cases where summary judgment motion have been made and denied. Secondly, these researchers have found that summary judgment "fundamentally alters the balance of power between plaintiffs and defendant by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants." (p. 75) And finally, these researchers found evidence which suggests that "liberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class." (p. 75)

The issue in this case is, of course, did Judge Tidwell apply the correct standard of summary judgment to his decision. The order entered by the district court did not cite *Adickes*, the

generally applicable rule, but rather cited the *Celotex* and *Anderson* cases which offered the exception to *Adickes*. The district court's summary of the summary judgment standard is generally accurate, albeit somewhat incomplete. The district court does define the standard which it applies when it writes:

> **Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof and (2) the summary movant has made a plausible showing of the absence of evidence on the necessary element.**

In support of this statement, the district court cites *Celotex*. It can therefore be said that, assuming the validity of the district court's interpretation, *if* the nonmoving party has the burden of proof at trial as to an essential element of his case, *if* the moving party makes a plausible showing that there is an *absence* of evidence to support the essential element, and *if* the nonmoving party fails to come forward with specific evidence which support the essential element, *then* summary judgment is appropriate.

As to the issues now before this Court, the Appellant Roy Lee Fowler, as the nonmoving party in the district court, contends that the above scenario does not apply to this case. Although Fowler does not deny that he has the burden of proof at trial, he does argue that the moving party on the motion for summary judgment in this case failed to show the absence of supporting evidence to the district court. Additionally, Fowler contends that he did come forward anyway with specific evidence from which a reasonable juror could return a verdict in his favor. Thus, his contention is that summary judgment, by the standard applied by the district court, and by the standard enunciated herein above, was inappropriate in this case.

> *Has this Supreme Court given adequate direction to the district courts concerning Rule 56 so that the lower courts can be reasonably uniform in their entry of summary judgment?*

The Decision of the District Court

Although the defendants in their motion for summary judgment raise five or six issues for the court to determine, Judge

Tidwell's Order addressed only three of those. First, the defendants had argued that Fowler's claims were barred by collateral estoppel. The defendants argued that the issues being litigated in the present case were equivalent to those before the Georgia Court of Appeals in *Fowler v. State*, 200 Ga.App. 505, 313 S.E.2d 100 (1991). The district court correctly rejected this argument holding that the constitutional issues of due process and compulsory process in this case were not, in fact, resolved by the Georgia Court. Therefore, the district court held that collateral estoppel was not a bar to Fowler's claim. The second argument made by the defendants was the Fowler had no evidence to support his allegation that Vanmeter intentionally erased the tape of his stop. The district court correctly rejected this argument also by ruling that "the evidence arguably permits the inference that Vanmeter taped the stop of Fowler and later erased the tape."

Nevertheless, when the district court addressed the third argument raised by the defendants, it found sufficient justification for the entry of summary judgment. The third argument made by the defendants was that even if Vanmeter intentionally erased the tape, Fowler still received a fair trial and his due process rights were not violated. In analyzing this argument, the district court assumed that the erased tape would have supported Fowler's contentions. Nonetheless, the district court agreed with the defendants and entered summary judgment against Fowler.

There are generally two arguments made by the district court in support of its conclusion that Fowler's rights were not violated. First, the district court concluded "that the outcome of Fowler's trial would not have been altered if he had been provided the tape recording indicating that he was not read his statutory rights prior to being administered the breath test." Secondly, the district court concluded that "the existence of the tape and the fact of its erasure" does not qualify as newly discovered evidence under Georgia Law. Based on its determination of these two issues, the district court granted the defendant's motion for summary judgment.

THE EVIDENCE PERMITS THE INFERENCE THAT VANMETER RECORDED THE STOP OF FOWLER AND SUBSEQUENTLY ERASED THE TAPE

The defendants asserted in their brief to the district court that Fowler did not have evidence showing that the defendants

intentionally deprived him of his rights. Thus, the defendants argued that Fowler's claim did not rise to the level of a substantive due process violation. The primary focus of their argument was that there was no evidence of intent on the part of Vanmeter. The defendants cited the case of *Daniels v. Williams*, 474 U.S. 327 (1986), which held that merely the negligent conduct of government (i.e., law enforcement) officials did not rise to the level of a due process violation. Thus, the defendants demanded that Fowler proffer some evidence to prove intent.

While intent is one of those elusive elements which courts had generally refused to consider on motions for summary judgment, the *Matsushita* case and the general liberalization of the summary judgment rule allow questions of intent to be considered. However, Fowler did in fact come forth with evidence in support of his contention the Vanmeter intentionally erased the tape. In support of his contention that Vanmeter erased the tape, Fowler pointed the district court to Vanmeter's inability to explain the blank portions on the tape, the presence of Vanmeter's voice on the tape stating "erasing some of the tape", the inconsistent statements of Vanmeter about the existence of the tape, and the testimony of the plaintiff's expert witness.

The acknowledgment of the Defendant Vanmeter that the voice on the tape was his stating "erasing some of the tape", combined with his failure or unwillingness to explain the blank space on the applicable portion of the tape, and his insistence that he had never replayed or examined the tape from the time it was made until delivered to his superior officer offer circumstantial evidence (words, conduct, demeanor, motive, etc.) from which a rationale trier of fact may infer intent. The various discrepancies in the testimony of Vanmeter support the inference that Vanmeter taped the traffic stop, failed to read Fowler his rights, and subsequently and intentionally erased the tape. This inference is further bolstered by the testimony of Mr. Robert Powers, an expert in the field of audio-visual equipment and recording.

Mr. Powers, an audio engineer and expert in the field, examined a copy of the tape as it was produced with the erased portion. Mr. Powers testified as to various elements of sound present on the tape. His findings indicate, for one that the portion of the tape with the stops temporally before and after Fowler both contain an "anomaly". His explanation for this anomaly was a weak set of batteries. However, the same anomaly does not occur in the summary of the Fowler arrest and the erased portion of the tape.

Power's concluded that the summary and the erasure were effected with either a clean set of batteries or an AC power source. Power's further testified that he believed that two tape machine were involved in the modification which occurred on the tape due to an analysis of the pink noise. Clearly these facts and opinions infer an intent on the part of Mr. Vanmeter.

Mr. Robert Powers, the audio engineer, therefore concluded that an intentional erasure had occurred on the tape. He states "I call it an intentional erasure because someone for -- someone for an excess of two minutes of time has placed the machine in record holding it." Although it is true that Mr. Powers was unable to identify if there was anything underneath the intentional erasure, much less unable to identify what it was, his testimony does support the claims of Mr. Fowler. Thus, additional inferential evidence is offered by Mr. Powers to suggest that Vanmeter did record the traffic stop and later intentionally erase it.

The district court ruled on the side of Fowler on this issue by stating "The evidence arguably permits the inference that Vanmeter taped the stop of Fowler and later erased the tape." Thus, the district court found a issue of material fact (i.e., the intentional erasure) which would need resolution by a trier of fact. Unfortunately for Mr. Fowler, the district court wrongly determined that this issue was not genuine for it would not effect the outcome of the case. In support of this conclusion the district court return to the actual trial in the State Court of Troup County. That is, therefore, where we return.

THE OUTCOME OF FOWLER'S TRIAL WOULD HAVE BEEN ALTERED HAD HE BEEN PROVIDED THE TAPE RECORDING OF HIS TRAFFIC STOP IN AN UNALTERED CONDITION

The defendants, in their motion for summary judgment, argued that even if the evidence permits the inference that Vanmeter intentionally erased the tape, there was still not due process violation for Fowler received a "fair trial". The defendants argued that even if the tape had shown Mr. Fowler's contention, there still would have been sufficient evidence to sustain a conviction. In support of this argument, the defendants relied upon the other evidence in the record which tended to show Mr. Fowler's intoxicated condition on the night in question. The defendants cited the applicable law of DUI in Georgia as upholding a

conviction for Mr. Fowler even with the addition of the tape in a hypothetically unerased condition.

The district court, in analyzing this argument, assumed that Vanmeter taped the traffic stop of Fowler and later erased it. Further, the district court assumed that the tape would have indicated exactly what Mr. Fowler claims, that he was not read his statutory implied consent rights in violation of O.C.G.A. § 40-6-392. Thus, the district court concluded that had the tape been unaltered, presented at trial, and indicative of Mr. Fowler's claims, then the evidence of the breath analysis would have been excluded. This is the appropriate result of being charged with DUI and not being read the statutory rights: an exclusion of the chemical analysis. See, for example, *Perano v. State*, 250 Ga. 704, 300 S.E.2d 668 (1983). However, the district court inaccurately concluded that the tape would have no bearing on the other evidence of intoxication offered by the State.

As to this other evidence, both the defendants and the district court contended that the other evidence of Fowler's intoxicated state, to wit: not being able to stand on one leg, not being able to recite the alphabet, his belligerent attitude toward the police, his personal appearance, and the smell of alcohol on his breath, would have been sufficient to conclude that Fowler was in fact under the influence of alcohol. Further, they contend that the evidence of Fowler's following another car too closely and failing to signal a turn suggest that he was less safe to drive a car due to his condition. From this evidence, the district court concluded that the outcome of the trial would not have been altered.

However, the district court incorrectly identified Mr. Fowler's position with regard to the tape's bearing on the other evidence of intoxication. The court states: "Fowler does not contend that the admission of the tape at trial would have affected the remainder of the evidence of intoxication proffered by the state." That statement is an incorrect representation of Mr. Fowler's contention.

In oral argument before the district court, it was brought to the Court's attention that the tape would have a highly probative impact on the rest of the evidence of intoxication for the tape would have been

> **a recording of his voice, and it would also be a recording of a sobriety test, at least an audio portion of it, a sobriety test that he was allegedly given, where he is alleged to made to stand on one**

foot, touch his nose, and recite his ABC's and this type of thing.

In this regard, the tape could have demonstrated to the jury if in fact Mr. Fowler was speaking belligerently or incoherently to the police officers as has been alleged. Further, Mr. Fowler has always disputed Vanmeter's statement that he could not recite his ABC's; rather, Fowler has contended that he had difficulty getting through them and that Mr. Vanmeter interrupted him in the process. So in addition to the proof that Mr. Fowler was not read his implied consent rights, the tape would have proven invaluable in bolstering Mr. Fowler's contentions that he was not in fact less safe to drive.

It also should be pointed out to this court that both the defendants and the district court inaccurately portray the hypothetical outcome of Mr. Fowler's trial had the breath test not been admitted. A careful reading of the trial transcript, however, reveals that in her charge to the jury Judge Little stipulated the requirement that in order to return a verdict of guilty, the breath test must be considered. Her charge states:

> **Now, Ladies, if after considering the testimony and the evidence which has been presented to you together with the charge of this Court, you should find and believe beyond a reasonable doubt that this defendant in Troup County, Georgia, did on or about the 20th day of August, 1989, then and there unlawfully *drive or be in actual physical control* of a motor vehicle while under the influence of alcohol to the extent that it was *less safe* for the person to drive *and* the person's *blood alcohol concentration* was 0.12 or more, then you would be authorized to find this defendant guilty. And in that event the form of your verdict would be: We, the jury, find the defendant guilty. (emphasis added)**

In that the jury, bound by the charge of the Court, returned a verdict in the form "We, the jury, find the defendant guilty," one can only suppose that the did in fact consider both pieces of information: the less safe provision and the blood alcohol content provision.

The defendants, however, suggested to the district court that under Georgia law one can be convicted under either the less safe provision or the technical violation of a chemical test. As persuasive authority, the defendants cited the case of *Love v. State*, 195 Ga.App. 392, 393 S.E.2d 520 (1990) as having held that one

can be charged under both of the provisions of less safe and blood alcohol content but only convicted on one. That is not exactly a correct reading of *Love*. In *Love,* the Georgia Court of Appeals held that *Love,* who was convicted of being under the influence of alcohol while driving a car and having a blood alcohol content of greater the .12 grams while driving a car, had in fact received two equivalent DUI conviction for the same act. Thus, the Court of Appeals held that this was a violation. The court did not, however, state that a jury could not use both pieces of evidence to hand down one charge of DUI. This latter alternative was the one used in Mr. Fowler's trial.

As cementing evidence of the actual intent of the trial court to direct the charge given, Mr. Fowler would note his attorney's question of the charge after the jury had gone out. Mr. Fowler's attorney suggested to the court that because the accusation against Mr. Fowler accused him of all of the three requirements above (driving or in control; less safe; and blood alcohol content) that her charge should have reflected those requirements. Mr. Kirby, the Solicitor, stated that "It was clear to me your Honor instructed the jury that they must find each and every material allegation of the accusation beyond a reasonable doubt. And you read the accusation." Thus, the State Court and the prosecuting attorney clearly believed that if a verdict of guilty was returned, it would necessarily be predicated on all three requirement of the accusation; the jury had to rule on both the less safe to drive and blood alcohol content provisions. Thus, the defendants' suggestion that Mr. Fowler would have been convicted of DUI even without the use of the breath analysis is flawed.

Obviously, Mr. Fowler's trial and his subsequent conviction were substantially based on the admission of his breath analysis. Recalling the district courts method of analysis, the evidence arguably suggests that the breath analysis would have been excluded from the trial had the tape not been erased. Further, the district court concluded that the evidence arguably permits the inference that the erasure of the tape was intentional. In light of the record, the defendants statement that "Had the intoximeter test results not been introduced into evidence in Fowler's trial for DUI, he would nonetheless have been convicted" is not supported.

If the district court seriously considers the function of an unaltered tape which supports Mr. Fowler's claim, then it must conclude that Mr. Fowler would have, in fact, been acquitted by the jury, if he was even brought to trial by the state. The outcome of

his trial would, therefore, have been substantially different had the exculpatory evidence not been destroyed. The District Court cited the case of *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) in concluding that "in order for the exclusion of exculpatory evidence to give rise to a due process violation, the defendant must show that there is a 'reasonable probability. . .that the outcome of the proceedings would have been different.'" Clearly, the record reflects that had the exculpatory evidence been made available, the outcome of the trial would have, in all likelihood, been different. At any rate, the above argument reflects the existence of a genuine issue of material fact requiring a trial by jury for resolution.

THE EXISTENCE OF THE TAPE AND THE FACT OF ITS ERASURE WERE NEWLY DISCOVERED EVIDENCE UNDER GEORGIA LAW

The final contention of the district court decided to the disfavor of Mr. Fowler was the issue of whether or not the existence of the tape qualified as newly discovered evidence under Georgia Law. It is the Mr. Fowler's contention that it does. The defendants have argued, however, that because the existence of the tape was discussed at the trial, it cannot be considered newly discovered evidence. The district court agreed with this assertion.

Both the district court and the defendants therefore contend that one of the following approaches should have been used by Mr. Fowler's attorney in the criminal trial: either (a) Mr. Fowler's attorney should have filed a Brady motion demanding the disclosure of exculpatory evidence or (b) Mr. Fowler's attorney should have stopped the trial in midstream, issued a subpoena for the tape, and sought a continuance from the trial judge. Neither one of these options was employed. Thus this Court is asked to determine whether the existence of the tape would be considered newly discovered evidence under Georgia law and whether Mr. Fowler's rights to the exculpatory evidence were waived by the failure of his attorney to file a *Brady* motion or seek a continuance.

From the onset, the Georgia law regarding newly discovered evidence has not been in dispute. The Georgia Supreme Court has affirmatively set the standard in *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980). Applying that caselaw, the district court held:

> **Under Georgia law, newly discovered evidence is evidence which (1) has come to the defendant's**

knowledge since the trial; (2) provided that it was not owing to the want of due diligence that he did not acquire it sooner; (3) and that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted in the only effect of the evidence will be to impeach the credit of a witness. All six requirement must be complied with to secure a new trial.

It can be assumed from the previous argument concerning the role of the tape in a trial in its unaltered form, that requirements three, four, and six would be met: a different verdict would most likely result from the addition of exculpatory, highly probative evidence. Requirement five does not apply. That leaves only the first and second requirements. On both of these, the district court ruled to the disfavor of Mr. Fowler.

(1) **"has come to defendant's knowledge since the trial"**

In deciding this issue, the trial court stated that the existence of the tape was discussed during the cross examination of Vanmeter. The entire discussion of the tape trial was actually very short. The cross examination of Mr. Vanmeter by Mr. Fowler's attorney with regard to the tape is actually very short; it reads, in relevant portion:

- - - -

Q. Did you have it with you that night?

A. I'm not sure if I had it on me or not. I ain't been long purchased the tape. I'm really not sure.

- - - -

Q. Do you have the tape with you today to play to the jury -

A. No, sir.

Q. -- about where you supposedly read these right to Mr. Fowler?

A. No, sir, but I have got it at home.

Q. You have got it at home?

A. I've got it if I had the tape -- if I had the tape, I've got it at home.

- - - -

When considered in light of the rest of Mr. Fowler's defense and the other issues the his attorney was attempting to highlight, the fact that he made a mental note to request the tape later and forgot, certainly does not constitute a waiver.

This Court must evaluate the record as a whole. Thus, in a transcript of a State Court misdemeanor trial, this Court needs to consider the desire of all parties to hurry the trial along without unnecessary delays and lawyer tactics. In this regard, it is unreasonable to expect the defense attorney to act upon every possible contingency which arises during the course of the trial. Courts do not generally view the action of an attorney in hindsight when mistakes are noticeable and errors replete.

It should be pointed out to this Court that neither the State Court Judge on the motion for new trial, nor the Georgia Court of Appeals had a difficulty with calling the tape newly discovered evidence *Fowler v. State*, 200 Ga.App. 505, 408 S.E.2d 449 (1991). Their reasoning for not granting the new trial was that the tape, *as discovered*, was not sufficient to overturn the conviction. Recalling the discovery of the tape, it had already be erased when it was presented to the court on the motion for new trial.

The questions concerning the existence of the tape abound. Why did Officer Vanmeter not bring the tape with him to trial if in fact he had it at home? Why was Officer Vanmeter unable to recall whether or not the tape actually existed? Why did Officer Vanmeter not offer to bring the tape voluntarily to Court? All of these questions indicate the never, at any point in the trial, was the actual existence of the tape confirmed. The testimony was that there may have been. Can this Court interpret such vague hypotheticals as "if I had the tape, then it might be at my home", as discovery in the legal sense?

The existence of the tape was not discovered at the trial. What was discovered at the trial was a veiled possibility that the tape might exist. The district court was therefore misreading the record when it asserted that the tape "was not discovered 'since trial.'" For this assertion, the district court cites the case of *Foreman v. State*, 200 Ga.App. 400, 408 S.E.2d 178 (1991). However, in *Foreman*, the court determined that the existence of a witness (i.e., a living human being) was discovered during the trial. The Georgia Court held that "The transcript from the trial and the motion for new trial are replete with evidence that defendant knew about the witness at trial, if not prior to trial." *Foreman*, 408 S.E.2d at 179. Clearly, the actual existence of an actual person is much

more meaningful than the possible existence of a tape recording, at least in the trial of a criminal case. And it should be noted, that no one, not the defendants nor the district court, has termed the transcript of the trial "replete with evidence that defendant knew" about the tape.

The circumstances surrounding the revelation of the tape during the trial can be used to infer that the "existence" of the tape was not known at the trial. The issue is not, therefore, as unambiguous as the district court believed. If this Court follows its practice in summary judgment proceedings as construes every conceivable inference to the favor of the nonmoving party, it will certainly see that a genuine issue of a material fact exists as to when, in fact, the existence of the tape and its subsequent erasure was discovered.

(2) "it was not owing to the want of due diligence that he did not acquire it sooner"

The district court argued in its Order that "once Fowler discovered the possible existence of the tape at trial, 'due diligence' required that he at least try to obtain the tape to determine its content during the trial." The court argued that Fowler could not know about the tape and wait until after his trial to complain about it. Rather, the district court concluded, Fowler should have sought a continuance and issued a subpoena for the tape during the trial. In support of this conclusion the district court notes that Fowler had "become aware of the tape's *likely* existence during trial" (emphasis added). As stated above, the existence of the tape, according to Mr. Vanmeter's testimony, was anything but likely. The district court contends that Fowler could have at the very least requested a continuance but did not do so.

If Mr. Fowler had requested a continuance what would have happened. For one, it would have been denied. Georgia criminal procedure, O.C.G.A. § 17-8-20 *et seq.*, leaves the decision to grant a continuance in a criminal trial largely in the hands of the trial judge. (O.C.G.A. § 17-8-22) Common exposure to the legal system is convincing that State Court misdemeanor trials proceed at a very fast pace and that judges in these trials loathe delays and stalling tactics. Had the actual existence of the tape been made known to the Court, it might have granted a motion for continuance. However, the vague hypotheticals used by Mr. Vanmeter did not

contain any such evidence of the tape's actual existence. Thus, the trial court would, in all likelihood, have denied a continuance.

The denial of the continuance would have had the same effect as that had during the real trial when no such motion was made. On the other hand, had the continuance been granted, it is likely that Mr. Vanmeter would have presented the court with an erased tape. How can the conclusion be justified? Well, recalling that for the purposes of this newly discovered evidence debate it is assumed that Vanmeter recorded the stop, and later erased the tape intentionally. If that is the case, then Mr. Vanmeter was obviously willing to destroy evidence which, for these purposes, we can assume was exculpatory. If he was willing to erase the tape prior to submission, it would be immaterial to him if the submission of the erased tape had occurred during the trial or at the motion for new trial. In either event, the effect would have been the same: to deny Mr. Fowler exculpatory evidence which would have likely prevented his conviction.

The defendants have tried to characterize the existence of the tape as *Brady* material. The Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Thus, the defendants contend that Mr. Fowler should have filed a Brady motion to uncover the tape prior to the trial. Once again, for this debate, it can be assumed that Mr. Vanmeter recorded the stop, it demonstrated exactly what Mr. Fowler claims, and Mr. Vanmeter subsequently erased it. How likely does it seem that Mr. Vanmeter would have complied with the requirements of *Brady*? He certainly had no sense of fundamental fairness. If he was willing to deny the tape to Mr. Fowler after the trial, he would have certainly been just as willing to deny it prior to or during the trial.

This court is therefore forced to consider a number of procedural issues. Did Mr. Fowler, by not seeking a continuance and not filing a Brady motion, fail to use due diligence in obtaining the tape. As already indicated the existence of the tape was not known during the trial. However, Mr. Fowler did attempt to discover the tape. His attorney asked Mr. Vanmeter about the existence of the tape. Thus, Mr. Fowler's attorney was using due diligence to try to uncover if in fact there was a tape. However, he ran into a wall when Mr. Vanmeter refused to say whether a tape

did or did not exist. The questioning itself shows that Mr. Fowler used due diligence to uncover the existence of the tape but that said existence did not come to his knowledge during the trial.

Thus, because the tape's existence did not come to Mr. Fowler's knowledge until after the trial although he had used due diligence to try to uncover it, the requirements of *Timberlake* and the district court are satisfied. The tape would, therefore, have been considered newly discovered evidence, as the Georgia courts were willing to treat it. Further, this Court must, in making all reasonable inference to the favor of Mr. Fowler, assume that the tape would have shown that Mr. Fowler was not read his implied consent warning, and further, that he was not acting, at least verbally, in a drunken intoxicated manner. With these assumptions it can be reasonably concluded that Mr. Fowler would have received his new trial and had his conviction overturned. Mr. Vanmeter's erasure of the tape thus can be said to have violated Mr. Fowler constitutional rights.

SUMMARY JUDGMENT INAPPROPRIATE

Mr. Fowler has demonstrated above that there is in fact evidence to support his assertion that Mr. Vanmeter intentionally erased the tape recording of Mr. Fowler's traffic stop. Further, Mr. Fowler has demonstrated that the effect of the tape, had it been in an unaltered condition, would have been to overturn his conviction for DUI. Finally, Mr. Fowler has shown this Court that the existence of the tape would have been newly discovered evidence under Georgia law and would have resulted in his receiving a new trial. The district court acted inappropriately, therefore, when it granted the defendants motion for summary judgment in concluding "that there are no genuine issues of material fact which could be determined in Fowler's favor that would allow Fowler to prevail on his claim for the unconstitutional denial of exculpatory evidence." Such a holding is inaccurate and incomplete in the light of the record and the above arguments. In this case, summary judgment was inappropriate.

SUMMARY OF THE ARGUMENT

In moving for summary judgment, the moving party must come forward with depositions, answers to interrogatories, admissions on file, affidavits, and other evidence to demonstrate to

the district court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. If the moving party is able to persuade the district court accordingly, the nonmoving party must come forward with similar evidence and demonstrate the existence of a genuine issue of material fact. If such an issue is found, summary judgment is generally precluded.

In presenting their motion for summary judgment, the defendants herein attempted to show that there were no such genuine issues. First the defendants alleged that Mr. Fowler's claims were barred by the doctrine collateral estoppel, issue preclusion. In so arguing, the defendant attempted to characterize this civil action as a rehash of the issue decided by the Georgia Court of Appeals in the appeal of Mr. Fowler's DUI conviction. However, the district court correctly distinguished this case from the Georgia appeal as Mr. Fowler's constitutional claims of due process were not a part of the Georgia court's decision, nor did they need to be.

The defendants next argued that Mr. Fowler would not be able to prove his allegations at a trial. This argument comes from the provision of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), which allows a moving party who does not have the burden at trial to show to the court that the nonmoving party who has the burden at trial will not be able to prove an essential element of his complaint. However, the district court correctly determined that there was sufficient circumstantial evidence to infer the allegations contained in Mr. Fowler's complaint. Thus, the district court rejected this argument by holding that Mr. Fowler could conceivably prove his allegations at a trial.

The defendants and the district court both argued that even had the tape been provided in an unaltered condition, and had it shown those facts which Mr. Fowler said it would have, the outcome of the trial would not have been altered. The district court's analysis was, however, flawed in that the court misread the Georgia DUI law and the relevant portions of the trial transcript. Rather, the hypothetically unaltered tape would have altered the trial to such a degree that it would have been unlikely that the same verdict would have resulted. Additionally, the district court incorrectly concluded that the existence of the tape was not newly discovered evidence since trial and as such, Mr. Fowler did not have an available remedy. Both of these analyses are flawed and should be corrected by this Court.

CONCLUSION

The Supreme Court should review this Case on a Writ of Certiorari in order to answer those questions presented to it for review. This case is clearly one in which Rule 56 as it has been interpreted by the federal courts is being used to keep an otherwise meritorious case from a jury because of various misreadings of the law. Does not Mr. Fowler have a right to have his claim reviewed by a jury of peers rather than by a biased Federal judiciary which sees its role in part as the protection of law enforcement officers?

There are so many inconsistencies in the testimony of the various law enforcement personnel that a jury could clearly infer an intent on Officer Vanmeter's part to deprive Mr. Fowler of his civil rights. Judge Hand at oral argument before the Eleventh Circuit asked Mr. Fowler's attorney: "How would you ever prove that?" Apparently Judge Hand saw his role on an appeal from summary judgment as that of trier of fact, which is not his role. Essentially, there is enough evidence in the record of this case to bring this case to a jury for trial.

At oral argument before the Eleventh Circuit, the counsel for Officer Vanmeter stated to the Court that "he would not defend" Mr. Vanmeter's actions. Rather, Vanmeter's attorney asked the court to allow Mr. Vanmeter to escape justice and to deny same to Mr. Fowler. Unfortunately, both the District Court and the Eleventh Circuit took just that approach and defended the actions of a corrupt law enforcement officer at the expense of a man's civil rights.

This is the court of last resort for Mr. Fowler. If this Supreme Court refuses to hear his case and eventually reverse the lower courts' decisions, then this court will be as guilty as those below who have deprived Mr. Fowler of his day in court, his right to a trial by jury, and his redress of a wrong committed upon him by an over-zealous cop with no regard for individual rights. Can this court allow such a miscarriage of justice to occur?

WHEREFORE, for all the within and foregoing reasons, this Court should grant this Petition for a Writ of Certiorari, should consider the merits of this case, and should reverse and remand this case for trial.

Respectfully submitted,

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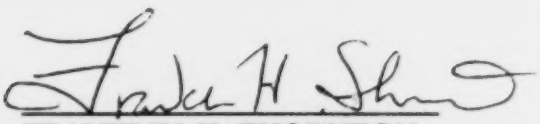
ATTORNEY AT LAW

BY: 

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APPENDIX

(Presented in the Order Listed)

Entry of Summary Judgment by the District Court

Affirmation by the Court of Appeals

Denial of Petition for Rehearing by the Court of Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

ROY LEE FOWLER	)	
	)	
Plaintiff	)	
	)	
v.	)	**Case No. 3:92-cv-9-GET**
	)	
WAYNE VANMETER; D. A. KERR; CITY OF WEST POINT, GEORGIA	)	
	)	
Defendants	)	

ORDER

The above-styled matter is presently before the court on the defendants' motion for summary judgment [docket no. 10].

Factual Background

On August 20, 1989, the plaintiff, Roy Lee Fowler (Fowler), was stopped while driving in West Point, Georgia, by West Point police officer defendant Wayne VanMeter (VanMeter) for suspicion of driving under the influence of alcohol. After Fowler failed two filed sobriety tests, VanMeter decided to take Fowler to the police station for an intoximeter test. VanMeter alleges that at this time he read Fowler his "implied consent warning" advising Fowler of his right to an independent chemical intoxication test pursuant to O.C.G.A. § 40-6-392. Fowler, however, contends that VanMeter did not give him the "implied consent warning."

Once at the station, the defendants allege that Fowler was again given his "implied consent warning." West Point police Sergeant Broome administered the intoximeter test to Fowler; he registered a blood-alcohol level of 0.15. VanMeter thereafter charged Fowler with operating a motor vehicle under the influence of alcohol.

Fowler contested the charge and went to trial. At trial Fowler's attorney asked VanMeter if he habitually audio-tape recorded his traffic stops. VanMeter stated that he may have taped his stop of Fowler but did not have the tape from the night of August 20, 1989 with him at trial. Fowler did not seek to obtain the tape for introduction at trial nor did he seek a continuance in order to obtain the tape for the trial. He was convicted on March 13, 1990.

After, his conviction Fowler filed a motion for new trial on the grounds of newly discovered evidence. Fowler, who had subpoenaed the tape from VanMeter, introduced the tape at the hearing on his motion. At the point on the tape where the recording of VanMeter's stop of Fowler should have been, however, the tape played unintelligible noise. A voice could also be heard at the end of the noise saying something to the effect of: "erasing some of the tape." Finding no grounds for the award of a new trial, the court denied Fowler's motion.

On appeal to the Georgia Court of Appeals, Fowler's conviction was affirmed. Fowler v. State, 200 Ga. App. 505, 408 S.E.2d 449 (1991). Fowler argued that the newly acquired tape provided evidence that Fowler had not been read his rights as required under O.C.G.A. § 40-6-392 and that thus the intoximeter results should not have been admitted. The court noted that the chemical analysis of Fowler's blood-alcohol content was admitted based on VanMeter's testimony that he advised Fowler of his statutory rights. Id. at 505. The court further observed that while Fowler presented as a witness at trial his companion on the evening of his arrest, the witness did not testify that Fowler was not read his rights. Id. Thus, the court held that the new evidence only impacted the credibility of VanMeter's testimony and thus was not grounds for a new trial. Id. at 505-06.

Procedural Background

Fowler filed the instant action on January 22, 1992 alleging that the defendants violated his constitutional rights in violation of 42 U.S.C. § 1983. More specifically, the complaint [docket no. 1] alleges that VanMeter's intentional and in bad faith conduct "deprived [Fowler] of evidence critical and exculpatory in nature and in effect served to deprive [Fowler] of due process of law in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments." (Compl. at 4).

The defendants filed the instant motion for summary judgment on September 1, 1992 [docket no. 10]. The defendants first pleaded collateral estoppel, stating that the claim raised by Fowler has already been litigated adversely to Fowler in his state court proceedings. Second, the defendants urge that Fowler has no evidence to support his allegation that VanMeter intentionally erased the tape of his stop of Fowler. Third, the defendants assert that even if VanMeter intentionally erased the tape Fowler nevertheless received a fair trial and his due process rights were not violated. Fourth, the defendants allege that all or part of Fowler's claims are barred by the statute of limitations. Lastly, the defendants assert that VanMeter is entitled to qualified immunity,

that Kerr's liability based on respondeat superior is not actionable under § 1983, and that the City of West Point is not liable under § 1983 because Fowler has not alleged or shown the prerequisites for municipal liability.

Fowler filed a brief in opposition to the defendants' motion for summary judgment on September 21, 1992 [docket no. 12]. Fowler's brief sets out more specifically than in his complaint the actual bases of is claims. First, Fowler asserts that VanMeter's erasure of the audio tape "deprive[d] Fowler of evidence exculpatory in nature that would have been so material as to raise a reasonable doubt about [Fowler's] ability to safely drive an automobile o[n] the night of August 20, 1989." (P. Br. Opp. Mot. Summ. J. at 5. [hereinafter P. Br.]) Second, Fowler raises the contention that VanMeter's erasure of the tape also deleted evidence that VanMeter failed to read Fowler his statutory rights. If this were established, Fowler asserts, the results of his breath test would have been inadmissible at his trial/

Fowler's principal arguments opposing summary judgment are as follows: (1) collateral estoppel does not bar the instant suit because the issue litigated in the state courts is not identical to that presented in the instant motion; (2) there is substantial evidence that VanMeter intentionally erased the tape; (3) VanMeter's erasing of the tape deprived Fowler of exculpatory evidence in violation of the Due Process Clause of the Fourteenth Amendment; (4) the statutes of limitation do not bar Fowler's claims because he was not aware of the violation until April 12, 1990 and he filed suit within two years thereafter; (5) that VanMeter is not entitled to qualified immunity because his tampering with evidence violated a "clearly established" legal right; (6) that Kerr's failure to take corrective action when told of VanMeter's alleged misconduct renders Kerr liable; (7) that the City of West Point is liable under § 1983 because its policy of receiving citizen complaints against officers is "either overly stringent or . . . lacking." (P. Br. at 16.)

Discussion

I. Summary Judgment Standard.

Rule 56(c), Fed. R. Civ. P., defines the standard for summary judgment: courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." In Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986), the Supreme Court interpreted Rule 56(c) to require the moving party to "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'pleadings, depositions, answers to interrogatories, and

admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Thus, the movant's burden is "discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving part's case." Id. at 325, 106 S. Ct. at 2554; see also United States v. Four Parcels of Real Property, 941 F. 2d 1428, 1437 (11th Cir. 1991).

Once the movant has met this burden, the burden on summary judgment shifts to the nonmoving party who must establish that there is a genuine material issue of fact remaining for trial. Celotex at 325, 106 S. Ct. at 2554. The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist. Id. The Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 2514 (1986), "that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." In making a determination of whether there is a material issue of fact, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. 225, 106 S. Ct. 2513; Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11 Cir. 1987).

However, an issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 249-50, 106 S. Ct. at 2511. Similarly, a fact is not material unless it is identified by the controlled substantive law as an essential element of the nonmoving party's case. Id. at 248. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) the summary judgment movant has made a plausible showing of the absence of evidence on the necessary element. Celotex, 323, 106 S. Ct. at 2552.

II. Application of Standard.

A. Collateral Estoppel. The parties agree on the four elements that must be presented in order to invoke the doctrine of collateral estoppel:

> 1. the issue sought to be precluded must be identical to the one involved in the prior litigation;
>
> 2. the issue must have actually been litigated in the prior litigation;
>
> 3. the determination of the issue in the prior litigation must have been a critical and necessary part] of the judgment in the earlier action; and
>
> 4. the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceedings.

See Boozer v. Higdon, 252 Ga. 276, 277-78, 313 S.E.2d 100 (1984). The court finds the first and third requirements to be dispositive on this issue. The judgment of the Georgia Court of Appeals, Fowler v. State, 200 Ga. App. 505, 408 S.E.2d 449 (1991), ruled on only two issues: the admissibility of the breath analyzer evidence showing Fowler's blood-alcohol level, and the propriety of the trial court's decision to deny Fowler's motion for new trial. See id. at 505-06. The defendants contend that the constitutional issues raised by Fowler in this case were the same issues considered by the Court of Appeals. However, the constitutional issues were not mentioned by the court in its opinion and were not a necessary part of the judgment. Accordingly, the court finds that collateral estoppel does not bar Fowler's claim.

B. Substantive Due Process Violation. The plaintiff asserts that VanMeter's alleged erasing of the audio tape violated his Fourteenth Amendment rights to both due process and compulsory process. An analysis of Fowler's complaint indicates that his claim is appropriately addressed under the Fourteenth Amendment as a violation of due process. See Pennsylvania v. Ritchie, 480 U.S. 39, 55-56 (1987).

The defendants assert that Fowler has failed to put forth evidence of a substantive due process violation in that there is no evidence showing that the defendants intentionally deprived Fowler of his rights. Specifically, the defendants contend that Fowler has not shown any evidence to prove that VanMeter intentionally erased the tape. The Fourteenth Amendment right to due process does not offer a remedy for the mere negligent conduct of government officials. Daniels v. Williams, 474 U.S. 327, 331-36 (1986). Thus, in order to establish a due process violation, Fowler must prove that VanMeter acted intentionally.

While Fowler clearly alleges that VanMeter intentionally erased the tape recording, the defendants contend that there is no evidence to support such a claim. As evidence of an intent to erase the tape, Fowler points to VanMeter's inability to explain the blank portions of the tape. (VanMeter dep. at 52, 53.) Further, VanMeter admitted during his deposition that it was his voice that was heard on the tape apparently stating that he was erasing some of the tape. (VanMeter dep. at 52, 53.) This voice apparently occurred on the tape immediately following the blank portion of the tape where the stop of Fowler should have been. (VanMeter dep. at 51-52.) Also offered by Fowler as evidence of intent is the inconsistent statement given by VanMeter about the existence of the tape. Both VanMeter and Broome testified that they checked VanMeter's tape on the night of Fowler's arrest and found that the stop of Fowler was not recorded. (VanMeter dep. at 82) (Broome dep. at 12.) Yet VanMeter testified at Fowler's trial that he did not know whether he had taped Fowler's traffic stop. (Trial trans. at 18.)

The evidence arguably permits the inference that VanMeter taped the stop of Fowler and later erased the tape. However, the defendants assert that even if the evidence raises an issue of fact as to whether VanMeter erased the tape, Fowler's due process rights were not violated. The defendants assert that there was no constitutional violation because Fowler received a "fair trial" and that the "introduction of the omitted evidence would not have resulted in an acquittal." (D. Mot Summ. J. at 22.) The court assumes, for the purposes of this argument, that VanMeter taped the stop of Fowler and at some point thereafter erased the tape. Given that the actual content of the tape is unascertainable, the court assumes that it would have indicated, as Fowler contends, that VanMeter failed to read Fowler his rights. See Bryant, 439 F.2d at 648.

Viewing the evidence in the light most favorable to the plaintiff, the introduction at trial of the tape showing that Fowler was not advised of his statutory rights under O.C.G.A. 40-6-392 could have led to the exclusion of the breath analysis performed on Fowler. Perano v. State, 250 Ga. 704, 708, 300 S.E.2d 668 (1983); Garrett v. Dep't of Pub. Safety, 237 Ga. 413, 228 S.E.2d 812 (1976); Nelson v. State, 135 Ga. App. 212, 217 S.E.2d 150 (1975). Fowler does not contend that the admission of the tape at trial would have affected the remainder of the evidence of intoxication proffered by the state.

In order for the exclusion of exculpatory evidence to give rise to a due process violation, the defendant must show that there

is a "reasonable probability . . . that the outcome of the proceedings would have been different." United States v. Spagnoulo, 960F.2d 990, 994 (11th Cir 1992). The existence of the tape would have only precluded the admission of the breath analyzer measurement of Fowler's blood-alcohol level, see Perano, 250 Ga. at 708, and would not have affected the other evidence presented by the state. The court concludes that the outcome of Fowler's trial would not have been altered if he had been provided the tape recording indicating that he was not read his statutory rights prior to being administered the breath test.

The evidence of the breath analyzer was only a portion of that used by the state in its case in chief. The trial transcript shows that, prior to stopping Fowler on August 20, 1989, VanMeter observed Fowler following another car too closely and failing to signal before turning. (Trial trans. at 7.) VanMeter also testified that he "smelled the strong odor of alcoholic beverages on [Fowler's] breath." (Trial trans. at 9.) Further, VanMeter offered uncontested testimony that Fowler admitted to having had "two or three beers" that night, that Fowler was unable to recite the alphabet on two attempts, and that Fowler was unable to stand on one foot. (Trial trans. at 9.) In addition to VanMeter's testimony, Sergeant Broome testified in court that she smelled alcohol on Fowler, that he look reddish, that he was loud and appeared to be intoxicated. (Trial trans. at 32.)

While Fowler has attempted to characterize the existence of the tape and the fact of its erasure as newly discovered evidence, it is clearly not. Under Georgia law, newly discovered evidence is evidence which (1) has come to the defendant's knowledge since the trial; (2) provided that it was not owing to the want of due diligence that he did not acquire it sooner; (3) and that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. All six requirements must be complied with to secure a new trial. Timberlake v. State, 246 Ga. 488, 491 (1980).

It is clear that the existence of the tape discussed at Fowler's trial during Fowler's cross-examination of VanMeter. (Trial trans. at 18-19.) Therefore, it was not discovered "since trial." See Foreman v. State, 200 Ga. App. 400, 400,408 S.E.2d 178 (1991). Further, once Fowler discovered the possible existence of the tape at trial, "due diligence" required that he at last try to obtain the tape to determine its content during the trial. Thus, Fowler cannot complain that he was unaware that the tape had been erased until several weeks after his trial. The tape, therefore, does not qualify as newly discovered evidence.

Furthermore, having become aware of the tape's likely existence during trial, Fowler cannot wait until the conclusion of the proceedings and then claim to have been prejudiced by not having the tape; rather, the proper remedy would have been to seek a continuance. See Green v. State, 249 Ga. 367, 371, 290 S.E.2d 466 (1982); Jarvis v. Cross, 244 Ga. 61, 62, 257 S.E.2d 510 (1979). Fowler clearly had the opportunity to at least request a continuance but did not do so.

The totality of the evidence produced at Fowler's trial leads the court to the conclusion that there is not a reasonable probability that the result of Fowler's trial would have been altered if he had obtained the tape indicating that VanMeter did not give Fowler the implied consent warning. Further, the evidence to which Fowler was allegedly denied access by VanMeter would not qualify as newly discovered evidence under Georgia law. For these reasons, the denial of the allegedly exculpatory tape to Fowler did not violate the Due Process Clause as incorporated in the Fourteenth Amendment. Accordingly, the defendant's motion for summary judgment is GRANTED.

Because the court has granted the defendant's motion based on the determination that there are no genuine issues of material fact which could be determined in Fowler's favor that would allow Fowler to prevail on his claim for the unconstitutional denial of exculpatory evidence, the court does not reach the remaining grounds presented by the defendants in their motion for summary judgment.

Summary

The defendant's motion for summary judgment [docket no. 10] is GRANTED.

SO ORDERED, this 21 day of April, 1993.

/s/ G. Earnest Tidwell
Judge, United States District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8547

D. C. Docket No. 3:92-CV-9-GET

ROY LEE FOWLER,

Plaintiff-Appellant,

versus

WAYNE VANMETER, D. A. KERR,
CITY OF WEST POINT, GEORGIA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 20, 1994)

Before KRAVITCH and CARNES, Circuit Judges, and HAND*, Senior District Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

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* Honorable William B. Hand, Senior U. S. District Judge for the Southern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8547

ROY LEE FOWLER,

Plaintiff-Appellant,

versus

WAYNE VANMETER,
D.A. KERR,
CITY OF WEST POINT, GEORGIA,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING
(February 23, 1994)

BEFORE: KRAVITCH and CARNES, Circuit Judges, and HAND*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Roy Lee Fowler, is denied.

ENTERED FOR THE COURT:

/s/ Ed Carnes
United States Circuit Judge

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* Honorable William B. Hand, Senior U. S. District Judge for the Southern District of Alabama, sitting by designation.